IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1263

LOU V. BREWER, Warden of the Iowa State Penitentiary at Fort Madison, Iowa,

Petitioner,

vs.

ROBERT ANTHONY WILLIAMS, a/k/a ANTHONY ERTHEL WILLIAMS

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals appears as App. A to the Petition, and is reported at 509 F.2d 227 (8th Cir. 1975). The opinion of the district court has been filed herein as Supplemental Appendix F, and is reported at 375 F.Supp. 170 (S.D. Ia. 1974).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Under 28 U.S.C. § 2254(d), when both parties agreed to submit the case on the state court record, did the district court err in resolving factual issues that were not resolved by the state trial court, and in making an independent determination of the constitutional issues, on the basis of the state court record?

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2. Where the record disclosed no evidence of a waiver by the respondent of his Fifth or Sixth Amendment rights, did the district court and court of appeals err in holding that the respondent's Fifth and Sixth Amendment rights were violated when a police officer, using a psychological ploy with the specific purpose of obtaining incriminating information before the respondent could consult with his attorney, interrogated the respondent in a police car in the absence of counsel, in violation of an agreement with counsel not to interrogate the respondent, and after several indications by the respondent that he did not wish to provide any information about the crime until he had seen his attorney?

3. Should this Court overrule Miranda v. Arizona, Massiah v. United States, and Escobedo v. Illinois?

CONSTITUTIONAL PROVISIONS AND STATUTES

The relevant constitutional provisions and statutes are set forth in Appendix E to the Petition.

STATEMENT OF THE CASE

The facts that are relevant to the legal issues in this case are clearly and completely set out in the opinions of the district court (App. F at A2-A10, 375 F.Supp. at 172-75) and the court of appeals (App. A at A2-A6, 509 F.2d at 229-31). The following is a brief outline of those facts.[1]

On December 24, 1968, Pamela Powers disappeared from the YMCA in Des Moines, Iowa. Respondent subsequently became a suspect, and a warrant was issued for his arrest on a charge of child stealing. On December 26, respondent telephoned a Des Moines attorney, Mr. McKnight, from Rock Island, Illinois. On Mr. McKnight's advice, respondent turned himself into the police in Davenport, Iowa. Respondent was arraigned in Davenport on the warrant for child stealing.

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[1]The petitioner's statement of the facts (Pet. at 4-6) consists primarily of evidence immaterial to the issues in this action, which involves no dispute about the facts of the crime itself. Moreover, the petitioner's review of the facts omits much of the evidence relied upon by the district court and the court of appeals.

While at the Davenport police station, respondent again telephoned Mr. McKnight, who was then at the Des Moines police station. In the presence of several police officers, including Detective Leaming, Mr. McKnight told respondent that the Des Moines police would transport him from Davenport to Des Moines, that he would not be mistreated or grilled, and that he should not make any statement until he arrived in Des Moines. Mr. McKnight and the Des Moines police also made an agreement that the police would pick up the respondent in Davenport, but that the respondent would not be interrogated about the case during the return trip to Des Moines.[2]

On December 26, Detectives Leaming and Nelson drove from Des Moines to Davenport to pick up the respondent. After they arrived in Davenport, Detective Leaming advised the respondent of his Miranda rights; however, Miranda warnings were never repeated during the ensuing trip back to Des Moines.

During the trip to Des Moines, Detective Leaming engaged in conversation with the respondent -- who Leaming knew was an escapee from a mental institution -- with what he admitted was the specific purpose of obtaining as much incriminating information as possible from the respondent before the respondent reached his attorney in Des Moines.[3] This was done despite Detective Leaming's knowledge of Mr. McKnight's instructions to the respondent not to make any statements about the crime, and despite the agreement with Mr. McKnight that the respondent would not be interrogated. The initial conversation covered a number of topics, including singing, organizing youth groups, the police investigation, and religion. According to Leaming's own testimony, the respondent on several occasions stated that information about the crime would be provided after he consulted

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[2]The petitioner's reference to an "alleged" agreement (Pet. at 5) is disingenuous at best, since the state trial court specifically found that such an agreement was made. App. F at A9-A10; 375 F.Supp. at 176.

[3]"Q: . . . You were hoping to get all the information you could before Williams got back to McKnight, weren't you?
A: Yes, sir."
(Testimony of Detective Leaming, R. at 136-67; App. F at A6-A7, 375 F.Supp. at 174).

with his attorney in Des Moines, Nevertheless, Leaming made a direct effort to elicit incriminating information from the respondent.

> Eventually, as we were traveling along there, I said to Mr. Williams that, "I want to give you something to think about while we're traveling down the road." I said, "Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way to Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas Eve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all."

When the respondent asked Leaming why he thought they would be passing by the body, Leaming responded that he knew that the body was somewhere near Mitchellville, Iowa.[4] Leaming then said: "I do not want you to answer me. I don't want to discuss it further. Just think about it as we're riding down the road."

After further discussion with Leaming, during which no Miranda warnings were given, and as the automobile approached the Mitchellville exit, the respondent stated that he would show the detectives where the victim's body was. He then did so.

The foregoing facts are not subject to dispute. In addition, the district court found two facts which are disputed by the petitioner: (1) that before the trip to Des Moines began, Mr. Kelly, a Davenport attorney with whom the respondent had consulted, told Leaming that the respondent should not be interrogated on the way to Des Moines; and (2) that Leaming refused Mr. Kelly permission to ride with the respondent to Des Moines. As will be argued more fully below, these findings clearly were correct; but in any event, they were not necessary to the district

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[4] In fact, Leaming did not know that the body was near Mitchellville, and admittedly made this statement solely to induce the respondent to divulge the location.

court's and court of appeals' decisions in this case.

At his trial, the respondent objected to the introduction in the state's case in chief of the statements obtained from him during the trip to Des Moines. After a hearing, these objections were overruled, the evidence was admitted, and the respondent was convicted. On appeal, the Iowa Supreme Court affirmed, with four Justices dissenting. On March 28, 1974, the district court granted the respondent's petition for a writ of habeas corpus; by agreement of the parties, this decision was based on the state court trial record. On appeal, the court of appeals affirmed, with Circuit Judge Webster dissenting.

ARGUMENT

Given the gross misconduct of Detective Leaming, the judgments of the district court and court of appeals in this case were clearly correct. Those judgments involved only direct, simple application of previous decisions of this Court, and no significant federal questions requiring review by this Court are presented.

I.

THE DISTRICT COURT AND COURT OF APPEALS CORRECTLY APPLIED 28 U.S.C. § 2254(d) IN RESOLVING THE FACTUAL AND LEGAL ISSUES IN THIS CASE.

By agreement of the parties, the district court relied entirely on the state trial court record, which included extensive testimony by all of the individuals involved in the events of December 26, 1968, in making its findings of fact in this action. The district court scrupulously observed the general presumption of correctness given to state court findings by 28 U.S.C. § 2254(d), and none of its findings conflicted with those of the state trial court. App. F at A10, A22, 375 F.Supp. at 176, 181. The district court did resolve some factual issues left unresolved by the state trial court; but this of course was proper under the explicit language of 28 U.S.C. § 2254(d)(1). See also, Townsend v. Sain, 372 U.S. 293, 313-14 (1963). Moreover, the district court resolved the constitutional issues

differently from the state courts. Again, this was clearly proper: The state court "cannot have the last say when it . . . may have misconceived a federal constitutional right." Brown v. Allen, 344 U.S. 433, 508 (1952). See also, Townsend v. Sain, supra, at 318; Oregon v. Hass, ___ U.S. ___, 95 S.Ct. 1215 (1975); Doerflein v. Bennett, 405 F.2d 171 (8th Cir. 1969).

The petitioner complains that in resolving the issue of waiver, the district court found that respondent requested the assistance of counsel during the trip to Des Moines. (Pet. at 7). Actually, a specific demand for counsel during the trip was unnecessary to the district court's holding that the respondent's Fifth and Sixth Amendment rights were violated in this case, since Leaming in any event ignored statements by the respondent's counsel that he should not be interrogated and in fact broke an agreement with counsel that the respondent would not be interrogated until they arrived in Des Moines -- and since there was no evidence in the record to support the State's burden of demonstrating waiver. App. F at A23-A24, 375 F.Supp. at 182-83; see also, App. A at A12-A13, 509 F.2d at 232-33. Moreover, Detective Leaming himself testified without contradiction that the respondent on several occasions asserted that he would provide information about the crime after consulting with his attorney in Des Moines. This may not have been a precisely or elegantly stated request for counsel at that moment during the automobile trip (an obvious physical impossibility); but there can be no question that these assertions by the respondent indicated clearly that he did not wish to make any statements about the crime in the absence of counsel. App. F at A18, 375 F.Supp. at 179-80; App. A at A13; 509 F.2d at 233.

The petitioner also asserts that the district court "adopted Williams' version of the facts entirely" in resolving a conflict between the testimony of Leaming and that of Mr. Kelly, a Davenport attorney, with regard to (1) whether Mr. Kelly told Leaming that the respondent should not be questioned on the way to Des Moines, and (2) whether Leaming denied permission to Mr. Kelly to ride with the respondent to Des Moines in order to protect his rights (Pet. at 8-9). Contrary to the petitioner's assertion, however, the district court explicitly did not credit the respondent's

testimony on this issue because of his obvious interest in the case. Rather, the district court resolved the conflict in testimony in Mr. Kelly's favor because of his status as an attorney with no apparent interest in the outcome -- and, more importantly, because of the state trial court's explicit doubts as to the credibility of Leaming. App. F at A10, 375 F.Supp. at 176; see also, App. A at A7-A8, 509 F.2d at 231. Particularly when the parties have specifically agreed to submit the case on the basis of the state court record, it is appropriate for the federal district court to consider both the interests of the witnesses and the state court's findings with regard to credibility in resolving factual issues. See, Note, Developments in the Law: Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1134-35 (1970); Jackson v. United States, 353 F.2d 862, 866 (D.C. Cir. 1965).

The petitioner's argument that the district court erred in not holding an evidentiary hearing to resolve this issue of fact (Pet. at 9) is ludicrous. The petitioner specifically agreed to submit the case on the state court record, and made no effort to request any further evidentiary hearings after the district court's judgment of March 28, 1974. The state may have a right to an evidentiary hearing in a federal habeas corpus proceeding; but it nevertheless is clear that "either party may choose to rely solely upon the evidence contained in [the state court] record. . . ." Townsend v. Sain, supra, at 322; see also, Heyd v. Brown, 406 F.2d 346 (5th Cir. 1969), cert. denied, 396 U.S. 818.

Finally, it should be noted that resolution of the issue of Mr. Kelly's role in the events of December 26, 1968, was not in any sense necessary to the lower courts' decision in this case. Even if Mr. Kelly had not even been present during those events, Detective Leaming's conduct still grossly and repeatedly violated the respondent's Fifth and Sixth Amendment rights.

II.

THE DISTRICT COURT AND COURT OF APPEALS CORRECTLY HELD THAT THE RESPONDENT'S FIFTH AND SIXTH AMENDMENT RIGHTS WERE VIOLATED IN THIS CASE.

On the basis of the facts outlined above, both the district court and the court of appeals held that the interrogation of the respondent during the trip from Davenport to Des Moines violated the constitutional standards

of Miranda v. Arizona, 384 U.S. 436 (1966). There was no question that proper warnings were given before the trip to Des Moines began. However, Miranda does not simply require warnings and then permit interrogation to continue automatically. During the trip to Des Moines, the respondent clearly indicated, on several occasions, that he did not wish to provide any information about the crime until he saw his attorney. Yet Detective Leaming, in the face of an agreement with the respondent's counsel not to interrogate him, admittedly sought, through a psychological ploy, to induce the respondent to provide such information before they reached Des Moines and the respondent's attorney, Mr. McKnight. As the district court and court of appeals held, this was an obvious violation of the Miranda decision. App. F at A17-A18, 375 F.Supp. at 179-80; see also, App. A at A13-A14, 509 F.2d at 233-34.[5]

In the face of these Miranda violations, there was no evidence in the record to support the State's burden of demonstrating a valid waiver by the respondent of his Fifth and Sixth Amendment rights. App. F at A21-A24, 375 F.Supp. at 181-83; App. A at A12, 509 F.2d at 233.[6] The fact that the respondent consulted with counsel before the automobile trip and was advised by them not to make any statements (Pet. at 11) does nothing to show a waiver of the respondent's constitutional rights during the automobile trip. In fact, the record shows nothing but the giving of warnings and the subsequent obtaining of statements -- clearly not enough to support a showing of waiver under Miranda. App. F at A23-A24, 375 F.Supp. at 182-

[5]The district court also held that Detective Leaming's failure to repeat the Miranda warnings during his "conversation" with the respondent further violated Miranda. App. F at A18-A19, 375 F.Supp. at 180.

[6]Although Detective Leaming testified that the respondent indicated that he understood that he was represented by Mr. McKnight in Des Moines and Mr. Kelly in Davenport, the petitioner's quite different assertion that the respondent "expressly stated he understood [the Miranda warnings'] meaning" (Pet. at 11-12) is not supported by the record or by the findings of the district court or state trial court.

83; App. A at A12, 509 F.2d at 233.[7] At the same time, Detective Leaming's use of deceipt with the respondent's counsel, his use of psychological pressure with the respondent, and the respondent's assertions of his desire not to provide information about the crime in the absence of counsel all weighed heavily against a finding of waiver.

A number of courts of appeal have found violations of Miranda v. Arizona, supra, in situations presenting far less serious governmental misconduct than is apparent on the record in this case. See, e.g., United States v. Clark, supra; United States v. Durham, supra; United States v. Thomas, 474 F.2d 110 (10th Cir. 1973), cert. denied, 412 U.S. 932; United States v. Nielsen, 393 F.2d 849 (7th Cir. 1968). Moreover, this Court has recently recognized a Miranda violation in a situation that is indistinguishable from the instant case, except insofar as it presented far less egregious violations of constitutional rights. In Oregon v. Hass, supra, the defendant was given proper Miranda warnings; after making initial incriminating statements, he expressed a desire to consult counsel. This Court held that incriminating evidence obtained from the defendant after his expression of his desire to have counsel but before counsel had been appointed was admissible to impeach the defendant; but this Court also implicitly accepted the holding of the Oregon Supreme Court that this evidence must be excluded from the State's case in chief because it was obtained in violation of Miranda. Hass is factually indistinguishable from the instant case -- except that in Hass, the defendant did not have counsel, and there was no evidence of psychological trickery or of the breaking of any agreements with

[7]The petitioner's assertion that Detective Leaming's "statement about the weather and locating the body occurred approximately two hours before Williams made any incriminating statements" (Pet. at 12) is not supported by the findings of fact of the district court or the state trial court. Indeed, the district court noted that the timing of Detective Leaming's "Christian burial" speech was not precisely clear from the record, but that this speech apparently occurred after a considerable amount of other conversation. In any event, as the district court noted, given Detective Leaming's approach, the timing of the speech was not really important. App. F at A27-A29, 375 F.Supp. at 184-85.

The petitioner's assertion that the respondent initiated conversations with Detective Leaming (Pet. at 12) similarly is unsupported by any finding of the district court or state courts, and seriously distorts the record. Indeed, Detective Leaming himself acknowledged on cross-examination that it was he who initiated conversation when the trip began. (T.T. at 261).

counsel not to interrogate the defendant. See also, Mathies v. United States, 374 F.2d 312 (D.C. Cir. 1967) (opinion by Burger, J.).

Both the district court and the court of appeals also held that the respondent's right to counsel was violated during the automobile trip to Des Moines, quite apart from Miranda. The Sixth Amendment violations in this case are at least as glaring as those involved in Massiah v. United States, 377 U.S. 201 (1964),[8] and Escobedo v. Illinois, 378 U.S. 478 (1964): According to the state court findings and Detective Leaming's own testimony, Detective Leaming used deceipt to isolate the respondent from his attorney and a psychological ploy to obtain incriminating information from the respondent before he could consult with him -- despite the agreement with Mr. McKnight that the respondent would not be interrogated and the respondent's own repeated assertions that he did not wish to provide information about the crime until he had seen his attorney. See also, McLeod v. Ohio, 381 U.S. 356 (1965).

A number of decisions of the circuit courts of appeal have reversed convictions on the basis of infringements of the right to counsel that were far less serious than those involved here. For example, in Taylor v. Elliot, 458 F.2d 979 (5th Cir. 1972), cert. denied, 409 U.S. 884, state agents transporting the defendant to Birmingham, Alabama, merely ignored the accused's mother's statement, relaying advice from defendant's counsel, that he was to make no statements until he arrived in Birmingham. The court of appeals held that statements obtained by the officers during the trip were improperly admitted into evidence under the Sixth Amendment, even though there was no evidence either of an agreement not to interrogate or of psychological coercion. See also, United States v. Clark, 499 F.2d 802 (4th Cir. 1974); United States v. Durham, 475 F.2d 208 (7th Cir. 1973); United States v. Crisp, 435 F.2d 354 (7th Cir. 1970), cert. denied, 402 U.S. 947; U.S. ex rel. Magoon v. Reincke, 304 F.Supp. 1014 (D. Conn. 1968),

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[8] Although the petitioner did not raise the issue, the district court found that adversary judicial proceedings had been initiated prior to the trip to Des Moines, since the respondent had been arrested and arraigned on the child-stealing warrant. App. F at A11-A12, 375 F.Supp. at 176-77.

aff'd, 416 F.2d 69 (2d Cir. 1969).

Contrary to the petitioner's assertion (Pet. at 10), the district court did not base its Sixth Amendment holding on the principle that the right to counsel could never be waived in the absence of counsel. The district court's conclusion that the respondent in this case could not have effectively waived his right to counsel was explicitly and carefully limited to the facts of this particular case:

> When the police have agreed with the defendant's attorney that the defendant will not be questioned in the attorney's absence, when another attorney has asked to be with the defendant at a particular time and place, and when the defendant has repeatedly asserted his desire not to talk in the absence of counsel, the police plainly should not be permitted to interrogate the defendant at all until further notice is given to his counsel. To hold otherwise would make it impossible for defense counsel fully to protect his client's rights without staying with him 24 hours a day.
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> App. F at A15-A16, 375 F.Supp. at 178-79.

In any event, as discussed supra, the district court and court of appeals correctly held that the state had shown no evidence to meet its burden of showing a valid waiver by the respondent of his constitutional rights.

III

THIS COURT SHOULD NOT OVERRULE ITS DECISIONS IN MASSIAH v. UNITED STATES, ESCOBEDO v. ILLINOIS, AND MIRANDA v. ARIZONA.

The weakness of the petitioner's position in this case is illustrated not only by his concentration on irrelevant facts in his Statement of the Case, but also by his explicit request that this Court overrule its decision in Miranda v. Arizona, supra. (Pet. at 13-14). This case did not involve the use of Miranda-violative statements to impeach, compare, Harris v. New York, 401 U.S. 222 (1971), Oregon v. Hass, supra; nor did it involve the use of derivative evidence obtained before the Miranda decision, compare Michigan v. Tucker, 417 U.S. 433 (1974). Rather, the district court and court of appeals reversed the conviction because of the use of the respondent's statements in the State's case in chief. Thus, the petitioner is forced to ask this Court to overrule directly Miranda v. Arizona. Such a decision would, however, clearly be inappropriate in this case, for a number of reasons.

First, the petitioner's assertion that "today's better trained criminal justice personnel are demonstrating maturity and responsibility and the system as a whole can be trusted not to abuse a more flexible standard" (Pet. at 13) is not only totally unsupported, but also proves too much. To the extent that police conduct has improved in response to the Miranda decision, the pressure toward "mature and responsible" police conduct that is provided by Miranda should be maintained, lest police conduct regresses to pre-Miranda levels.[9] The facts of this case, which occurred well after the Miranda decision, amply illustrate the need for continued application of the Miranda guidelines, particularly insofar as they prohibit the interrogation of an accused after he has been purposefully isolated from counsel and in the face of indications by the accused that he wishes to remain silent in the absence of counsel.

Moreover, even if consideration of the overruling of Miranda were appropriate, this would not be an appropriate case in which to do so, since such a decision still would not change the judgments of the district court and court of appeals. This is not a case in which Miranda had to be "mechanically" or "technically" applied in order to reach the result that was reached by the district court and court of appeals. As those courts carefully pointed out, Detective Leaming's purposeful isolation of the respondent from his counsel, his breaking of the agreement with the respondent's counsel, his ignoring of the respondent's several statements of his desire to provide information only after consulting with counsel, and his admitted attempts to obtain information from the respondent before he had an opportunity to consult with his attorney would require reversal of the respondent's conviction quite apart from the Miranda decision. In order to change the result reached by the district court and court of appeals, petitioner must ask this Court to overrule not only Miranda, but also virtually every other decision of this Court involving Fifth and Sixth Amendment rights, including Massiah v. United States and Escobedo v. Illinois, supra.

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[9] Moreover, if the police are now more responsible, then application of the Miranda standards to exclude improperly obtained evidence from the prosecution's case in chief will not have an adverse impact on the interests of the State in a significant number of cases.

Indeed, petitioner in effect must ask this Court to pretend that the Fifth and Sixth Amendments themselves do not exist.

CONCLUSION

The record in this case shows gross and repeated violations of the respondent's Fifth and Sixth Amendment rights and the decision of the district court and court of appeals were clearly correct. Even if the overruling of Miranda were appropriate, such a decision would be fruitless in this case, since the constitutional violations herein do not hinge upon the requirements of that case. Hence, this case presents no significant federal questions requiring review by this Court, and the petition for a writ of certiorari therefore should be denied.

Respectfully submitted,

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